

AMD17-144 4/15/08

Bell, Leanne S (DOT)

From: Jeff Parker [GParker@alaska.net]
To: Monday, April 14, 2008 9:57 PM
Subject: DOT STIP
Attachments: comments
Comments on 2006-09 STIP Amend't 17 re Cook Inlet Bristol Bay Corridor Projects JP.doc

Submitting these comments on behalf of Nondalton Tribal Council, Trout Unlimited and Robert Gillam. I will fax another resolution from the Nondalton Tribal Council and the City of Nondalton, as an attachment to these comments. Please attach it to these comments. Thank you.

Sincerely,

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April 14, 2008
VIA EMAIL

Jeff Ottesen
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Statewide Planning Division - Division of Program Development
3132 Channel Drive, Suite 200
Juneau, Alaska 99801-7898
Via facsimile: 907-465-6984

CC: Tim Huagh, FHWA, Juneau
Via facsimile: 907-586-7420
Jim Helfenstine, USCG, Juneau
Via facsimile: c/o legal 907-463-2054

Re: Draft FFY 2006-2009 STIP Amendment No. 17 – re: Projects on the Cook Inlet to Bristol Bay Corridor.

Dear Mr. Ottesen:

These comments address the draft Amendment No. 17 to the Federal fiscal year (FFY) 2006-2009 Statewide Transportation Improvement Program (STIP). They are submitted on behalf of my clients, the Nondalton Tribal Council, Trout Unlimited and Robert B. Gillam. These update my comments submitted on my clients' behalf regarding Amendment No. 13 in 2007.

These comments address the Iliamna-Nondalton Road and Bridge project, the Williamsport-Pile Bay Road project, and the Pedro Bay Rushing River Bridge Replacement. These projects are on the Cook Inlet to Bristol Bay Corridor ("Corridor"), which would cost several hundred million dollars according to the Southwest Alaska Long Range Transportation Plan.

Each of these projects would be a segment providing access to the proposed Pebble Mine, to and from, either Williamsport, Iliamna, or Nondalton. All of the projects have inadequate NEPA compliance due to issue of unlawful segmentation.

A. Comments Specific to the Three Projects.

1. Iliamna-Nondalton Road and Bridge Project.

This is new construction to complete a partial road. According to the draft STIP Amendment No. 17, the cost of the Iliamna-Nondalton road and bridge project has increased by about \$17.1 million over the last 12 months. The overall total estimate is now \$35.9 million.

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This is composed of an estimated \$18.8 million in FFY 2009,¹ plus \$17.1 million² after FFY 2009.

In 1995, Governor Knowles, the Lake and Peninsula Borough, and ADOT&PF proposed this project. At that time, ADOT&PF estimated the cost at about \$5 million. Although I understand that construction and material costs have risen since the mid-1990s, this *seven-fold* increase in costs draws into question the process by which ADOT&PF estimates project costs, scores projects with the project evaluation criteria, and assesses cost-effectiveness of projects for purposes of AS 44.42.050.

Three legal problems arise.

First, ADOT&PF no longer has a legally sufficient cost-effectiveness study. The study completed several years ago in response to the injunction my clients obtained was based on a \$12-million cost-estimate (about one-third the current overall estimate). In my comments filed in 2007, I pointed out that the cost estimate had then risen 50 percent since the cost-effectiveness study – i.e., from about \$12 million to nearly \$19 million. My 2007 comments urged a new cost-effectiveness study. Now, costs have risen 300 percent. Hence, I would appreciate an answer to these questions: (1) At what point do you decide that a project now longer has a legally sufficient cost effectiveness study, and (2) How will you explain to the legislature that a 300 percent increase in costs does not trigger a new cost-effectiveness evaluation under AS 44.42.050?

Second, because the source of funds for the \$17.1 million beyond FFY 2009 is not stated, ADOT&PF is in no position to claim that the project meets federal statutory requirements that funds “can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project.” Federal law, at 23 USC §135(g)(4)(E) provides:

(E) Requirement of anticipated full funding.— The transportation improvement program shall include a project, or an identified phase of a project, only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion of the project.

Thus, the Iliamna-Nondalton project cannot be legally included in the STIP amendment.

Third, this project was scored in 1995 using the project evaluation criteria when the project estimate was about \$5 million. That score is now out-of-date.

¹ Amendment No. 17 says \$18.8 million in FFY 2009 would be comprised of \$17.1 million of state funds for “advance construction” conditioned upon FHWA approval before federal-aid highway funds are available, and \$1.7 million of state matching funds.

² The source of these funds beyond FFY 2009 is not stated in Amendment No. 17.

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In addition, other long-standing problems still persist. The U.S. Coast Guard permit for the Newhalen River bridge has expired. The Coast Guard has informed the ADOT&PF that the Coast Guard cannot issue a new permit until FHWA complies with the National Environmental Policy Act ("NEPA"). It requires the agency to analyze the impacts of all road and bridge segments on the Corridor, including the direct, indirect and cumulative impacts.

On June 9, 2005, FHWA directed ADOT&PF to prepare for FHWA a written re-evaluation of the 2001 environmental assessment for the Iliamna-Nondalton project. Specifically, FHWA directed ADOT&PF to address: (1) whether other projects on the corridor are connected actions that must be analyzed in a single environmental document, and (2) the cumulative impacts of these other road projects and the development of the proposed Pebble Mine. This review is to consider the impacts of all projects on the corridor as well as Pebble Mine. I understand that ADOT&PF has yet to complete that review and obtain FHWA approval. If that is no longer correct, please advise me of such.³

As you know, the residents of Nondalton have voted several times to oppose the Iliamna-Nondalton road and bridge project. Most recently, on February 27, 2007, in an election conducted by the Lake and Peninsula Borough, the residents of Nondalton voted 23 to 14 against the project. On August 4, 2006, the Nondalton Tribal Council adopted the enclosed resolution opposing the project. It is signed by all members of the Nondalton Tribal Council, all but one member of the Nondalton City Council, 53 members of the tribe, and 4 non-tribal residents of Nondalton. On November 17, 2007, the Nondalton Tribal Council and the City of Nondalton passed another joint resolution (Joint Resolution 08-11) asking the Lake and Peninsula Borough to remove the project from its priorities. (I will fax this resolution to you.)

Obviously, a lot has changed since the project was proposed in 1995. There is no reasonable basis for FHWA to continue to approve the STIP with this project in the STIP. It is time to drop the project until all connected actions and cumulative impacts are assessed, including Pebble Mine and transportation projects that are interconnected on the Corridor that would serve it.

2. The Williamsport-Pile Bay Road.

This project would cost an estimated \$9.3 million in FFY 2008. However, comparing the project description in Amendment No. 17 to the description in Amendment No. 13 reveals that, although the project description remains the same, ADOT&PF has not included in the current

³ In 2006, ADOT&PF's consultant (URS) wrote to Mayor Tracey of the City of Nondalton that the re-evaluation of the environmental assessment for the Iliamna-Nondalton project would include cumulative impacts of the Pebble Mine. (A copy of the URS letter was sent to Susan Wick at ADOT&PF). Later, URS advised me that that there would be an opportunity for public comment on the draft re-evaluation. To date, ADOT&PF has provided no such opportunity for public comment.

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amendment the \$18 million identified in Amendment No. 13 as necessary to complete the project for year after FFY 2009. So again, 23 USC §135(g)(4)(E) bars inclusion of the project in the STIP Amendment No. 17 because the funds to complete it are not reasonably anticipated to be available.

Furthermore, the same rationale that underlies FHWA's directive of June 9, 2005 applies to this project. It is a connected action in that the Williamsport-Pile Bay project would connect to reasonably foreseeable projects upon which Pebble Mine would depend. ADOT&PF lacks adequate NEPA compliance until it complies with the 2005 directive.

Regarding the Williamsport-Pile Bay road project, ADOT&PF obtained a temporary emergency permit in 2003 to replace the Iliamna River bridge after a flood. Such permits are short-lived and do not require conventional NEPA compliance. The result is that, as recently as 2006, the Coast Guard advised ADOT&PF that it must either obtain a permanent permit, for which the Coast Guard or FHWA would be required to conduct a NEPA review, or ADOT&PF must remove the bridge. To our knowledge, ADOT&PF has done neither. Thus, the Iliamna River bridge is an illegal structure. The bridge will not be legal until ADOT&PF applies for a permit, and then the Coast Guard or FHWA conducts a NEPA analysis and makes a decision on ADOT&PF's permit application. Similarly, the costs of Williamsport-Pile Bay improvements have risen steeply. Thus the cost-effectiveness of this project also must be reevaluated as the previous study is outdated, particularly in light of the information we previously provided that showed that, in one recent year (2005 as I recall), only about ten boats used the road for transport from Williamsport to Pile Bay after all of the bridges were in place.

3. The Rushing Creek bridge replacement at Pedro Bay.

Like the other projects on the Corridor, this project faces the similar issues and should be dropped until proper NEPA compliance that addresses cumulative impacts of connected projects on the corridor and Pebble Mine. Like the other projects, this project demonstrates ADOT&PF's unlawful segmentation of the corridor. This project would replace an existing bridge with one capable of handling heavy equipment. Because the bridge is presently not on an interconnected road, the only reason for up-grading the bridge to handle heavy equipment appears to be Pebble, and if that is not the case, then a new bridge will have to be replaced again to handle loads destined for Pebble. It makes no sense to replace an existing bridge only to replace it again shortly thereafter if the Corridor is completed to Pebble.

B. Efforts to obtain "advance construction" approval using state funds creates the same problem Former Governor Murkowski encountered in trying to use state funds to advance the Juneau access project without NEPA compliance.

The draft STIP states that the Iliamna-Nondalton project would be funded in part under the advance construction provisions of 23 U.S.C. 115, whereby FHWA would use federal funds for FFY 2009 to reimburse the state's earlier use of its own funds in FFY 2008.

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This is the same tactic ADOT&PF attempted with the Juneau Access project when Former Governor Murkowski sought to use state funds to advance that project without first completing the required NEPA review. On November 27, 2006, FHWA refused to give the state credit and provide future reimbursement in return for the state's funding the Juneau Access project because the project would require federal funds, which trigger the requirement for a NEPA review, and the NEPA process on the federal permits from the Corps of Engineers was incomplete.

As was the case with the Juneau access project, FHWA will disapprove use of advance construction funding for Iliamna-Nondalton project before the re-evaluation of the NEPA documents is complete, including any new permits by the Coast Guard,.

C. The STIP schedule for these projects unlawfully segments the Cook Inlet to Bristol Bay Corridor and erroneously assumes that they will require only an environmental assessment instead of an environmental impact statement.

The Cook Inlet to Bristol Bay corridor is a huge project that would create road access to the Bristol Bay drainages and significantly impact the environment of the region. Repeatedly, the Coast Guard has raised the issue of unlawful segmentation of the corridor as the projects are planned to be built incrementally without first preparing a full environmental impact statement, that would probably be programmatic in nature. Most recently, this same issue was raised in the context of the re-evaluation.

Thus, the state should take no further steps in planning or constructing any of these projects on the Corridor until an EIS is completed and any challenges resolved. Until an EIS is complete, the construction phases of these projects do not belong in the STIP.

Sincerely yours,

Geoffrey Y. Parker

Attachment: Nondalton Tribal Council Resolution of November 17, 2007 faxed separately

cc: via email w/o attachment
Jack Hobson, president, Nondalton Tribal Council
Tim Bristol, Trout Unlimited
Robert B. Gillam